Supreme Court, U.S.
FILED
APR 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1526

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ERIC A. GRIFFIN,
Petitioner,

vs.

GREGORY HILKE and FRANCIS STOLL,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JAMES J. WILSON
City Counselor
*JULIAN L. BUSH
Assistant City Counselor
Room 314 City Hall
St. Louis, Missouri 63103
(314) 622-3361

Attorneys for Respondents

*Counsel of Record

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

TABLE OF CONTENTS

	Page
Table Of Authorities	ii
Statement Of The Case	1
Reasons Why The Petition Should Be Denied	2
1. The Petition Does Not Raise Important And Unsettled Issues And There Is No Contemporary Conflict Among The Circuits	2
2. The Qualified Immunity That Respondents Enjoy Provides An Independent Ground Upon Which The Judgment Of The Court Of Appeals May Be Sustained, And The Issue Is One That Should Be Ruled Upon By The Lower Courts	7
3. The Court Did Not Depart From The Accepted And Usual Course Of Judicial Proceedings In Finding Prejudicial Error In Petitioner's Closing Argument	13
Conclusion	15

TABLE OF AUTHORITIES

Page

Cases:

Allee v. Medrano, 416 U.S. 802 (1974) 3

Alma Motor Co. v. Timken-Detroit Axle Company, 329 U.S. 129 (1946) 12

American Construction Co. v. Jacksonville T. & K.R. Co., 148 U.S. 373 (1893) 12

Ashcroft v. Mattis, 431 U.S. 171 (1977) 9

Baker v. McCollan, 443 U.S. 137 (1979) 4

Barr v. Mateo, 355 U.S. 171 (1959) 12

Board of Regents v. Roth, 408 U.S. 564 (1972) 10

Bruner v. Dunaway, 684 F.2d 422 (6th Cir. 1982) 6

Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972) 4, 5, 6

Chardon v. Fumero Soto, 462 U.S. 650 (1983)..... 5

City of Oklahoma City v. Tuttle, 471 U.S. ____, 85 L.Ed.2d 791, 105 S.Ct. 2427 (1985) 7, 8

City of Springfield v. Kibbe, 55 U.S.L.W. 4239 (1987).. 4

Clark v. Beville, 730 F.2d 739 (11th Cir. 1984)..... 8

Coleman v. PACCAR, Inc., 424 U.S. 1301 (1976) 12

Coon v. Ledbetter, 780 F.2d 1158 (5th Cir. 1986) 9

Daniels v. Williams, 474 U.S. ____, 88 L.Ed.2d 662, 106 S.Ct. 662 (1986) 5, 6

Davidson v. Cannon, 474 U.S. ____, 88 L.Ed.2d 677, 106 S.Ct. 668 (1986) 5, 6

Davis v. Scherer, 468 U.S. 183 (1984) 10

Davis v. United States, 417 U.S. 934 (1974) 6

Emory v. Duckworth, 555 F.Supp. 985 (N.D.Ind. 1983) 6

Escamilla v. City of Santa Ana, 769 F.2d 266 (9th Cir. 1986) 6

Fernandez v. Chardon, 681 F.2d 42 (1st Cir. 1982) 5

Fernandez v. Leonard, 784 F.2d 1209 (1st Cir. 1986) ... 8, 9

Hague v. CIO, 307 U.S. 496 (1939) 2

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 7

Haygood v. Younger, 718 F.2d 1472 (9th Cir. 1983) 5

Hewitt v. Helms, 459 U.S. 460 (1983) 10

Hirst v. Gertzen, 676 F.2d 1252 (9th Cir. 1982) 6

Hobson v. Wilson, 556 F.Supp. 1157 (D.C. 1982)..... 14

Johnson v. Duffy, 588 F.2d 740 (9th Cir. 1978)..... 6

Jones v. Marshall, 528 F.2d 132 (2nd Cir. 1975) 2

Justice v. Dennis, 793 F.2d 573 (4th Cir. 1986) 8

Kehr v. Smith Barney, Upham & Harris Co., 736 F.2d 1283 (9th Cir. 1984)..... 13

Malley v. Briggs, 475 U.S. ____, 89 L.Ed.2d 271, 106 S.Ct. 1092 (1986)..... 7

Massey v. Smith, 555 F.Supp. 743 (N.D. Ind. 1983) 6

Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976) 9

Mitchell v. Forsyth, 472 U.S. ____, 86 L.Ed.2d 411, 105 S.Ct. 2806 (1985) 13

Monell v. Dept. of Social Services, 436 U.S. 658 (1978) 3, 4, 6, 7

New York Central Railroad Company v. Johnson, 279 U.S. 310 (1929) 15

Parratt v. Taylor, 451 U.S. 527 (1981) 5, 6, 11

Perrin v. Anderson, 784 F.2d 1040 (10th Cir. 1986) 14

Putnam v. Gerloff, 639 F.2d 415 (8th Cir. 1981) 6

Regents of University of Michigan v. Ewing, 474 U.S. ____, 88 L.Ed.2d 523, 106 S.Ct. 507 (1985) 10

Risner v. Duckworth, 562 F.Supp. 378 (N.D. Ind. 1983) 6

Rizzo v. Goode, 423 U.S. 362 (1976) 2, 3, 4, 5, 6, 7

Rochin v. California, 342 U.S. 165 (1952) 10

Roy v. Employers Mutual Casualty Company, 368 F.2d 902 (5th Cir. 1966)..... 14

S.S. Monrosa v. Carbon Black Export, 359 U.S. 180 (1959) 11

Smith v. Heath, 691 F.2d 220 (6th Cir. 1982) 5

Spruytte v. Walters, 753 F.2d 498 (6th Cir. 1985) 11

Tennessee v. Garner, 471 U.S. ____, 85 L.Ed.2d 1, 105 S.Ct. 1694 (1985)..... 8, 9

Ware v. Reed, 709 F.2d 345 (5th Cir. 1983) 5

Washington v. Starke, 626 F.Supp. 1149 (W.D. Mich. 1986), *appeal dismissed,* 791 F.2d 936 (6th Cir. 1986) 11

Westbrook v. General Tire & Rubber Co., 754 F.2d 1233 (10th Cir. 1985)..... 13

Whitney v. Albers, 475 U.S. ____, 89 L.Ed.2d 251, 106 S.Ct. 1078 (1986) 10

Wiley v. Memphis Police Dept., 548 F.2d 1247 (6th Cir. 1977), *cert. den.*, 431 U.S. 968 9

Constitutional and Statutory Provisions:

U.S. Const. Amend. IV 2, 10

42 U.S.C. §1983 ..... 2, 3, 7, 10, 14

Miscellaneous:

M. Avery & D. Rudovsky, Police Misconduct: Law and Litigation §3.5(a) (2nd Ed. 1985) 15

Newman, Suing the Lawbreakers: Proposals to Strengthen The Section 1983 Damage Remedy For Law Enforcers' Misconduct, 87 Yale L.J. 447 (1978) 14-15

Project, Suing the Police in Federal Court, Yale L.J. 781 (1979) 15

No. 86-1526

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ERIC A. GRIFFIN,
Petitioner,

vs.

GREGORY HILKE and FRANCIS STOLL,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The respondents Gregory Hilke and Francis Stoll respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit opinion in this case. That opinion is reported at 804 F.2d 1052 (1986).

STATEMENT OF THE CASE

It would unduly lengthen this brief to correct each and every inaccuracy and omission contained in petitioner's statement of the complicated facts of this case. Instead, respondents incorporate by reference the statement of facts in the opinion below (Pet. App. 2a-3a), which is fair and evenhanded.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Petition Does Not Raise Important And Unsettled Issues And There Is No Contemporary Conflict Among The Circuits.

a. Petitioner asks this Court to grant his petition to determine whether a remote actor may be held liable pursuant to 42 U.S.C. §1983 for constitutional injuries directly inflicted by another where such constitutional injuries would not have been suffered but for the remote actor's negligence. Specifically, he argues that respondent Stoll can be held liable for a seizure made by respondent Hilke partly in reliance upon the communication of inaccurate information by Stoll, where Stoll's miscommunication was arguaby the result of Stoll's negligent evaluation of the situation that confronted him. It can scarcely be denied that this issue is an important one; however, if the issue has not been fully settled by the Court's earlier pronouncements, it has been all but settled.

There have been two lines of cases that have focused on §1983 liability of remote actors. One line, represented most prominently by *Rizzo v. Goode,* 423 U.S. 362 (1976), considers the liability of public employees who supervise other public employees for the constitutional torts committed by their supervisors. Significantly, it appears that the claimed constitutional violations in *Rizzo* were Fourth Amendment ones just as in the case at bar. The *Rizzo* district court found that, as a result of defendant supervisors' decision not to change police procedures, constitutional violations would occur. *Id.* 423 U.S. at 371. Plaintiff argued that defendants' failure to act breached a constitutional duty that defendants were obligated to acquit. *Id.* 423 U.S. at 376. The Court rejected plaintiff's theory, contrasting the case before the Court with *Hague v. CIO,* 307 U.S. 496 (1939), noting that liability was imposed on the remote actors in *Hague* for "the adoption and enforcement of *deliberate* policies...", *Rizzo,* 423 U.S. at 374 (emphasis added); with

Allee v. Medrano, 416 U.S. 802 (1974), where the named defendants themselves engaged in an "*intentional,* concerted, and indeed conspiratorial effort...", *Rizzo,* 423 U.S. at 375 (emphasis added); and with school desegregation cases where the defendants were officials who were "found by their own conduct" to have denied plaintiffs' rights. *Rizzo,* 423 U.S. at 377. The Court's ruling in *Rizzo,* as fairly characterized by the dissenting justices, was that an "official is not subject to the strictures of 42 U.S.C. §1983 unless he directs the deprivation of constitutional rights." *Rizzo,* 423 U.S. 384 (Blackmun, J., dissenting).

Another line of cases dealing with the liability of remote actors is *Monell v. Dept. of Social Services,* 436 U.S. 658 (1978), and *Monell's* progeny. Such cases consider whether a city may be liable under §1983 where the city's policy causes a constitutional injury. Because the injury is immediately caused by a natural person, the city's position is normally that of a remote actor. Indeed, *Monell* itself implicitly recognizes the affinity that cases involving municipal liability have for cases involving supervisory liability by the opinion's reference to *Rizzo.* See *Monell,* 436 U.S. at 693 n.58.

Justice O'Connor, on behalf of four justices, recently summarized the *Monell* line of cases as follows:

> "Given the importance, under §1983, of distinguishing between direct and vicarious liability, the Court repeatedly has stressed the need to find a direct causal connection between municipal conduct and the constitutional deprivation. See e.g., Oklahoma City v. Tuttle, 471 U.S. at 824-825 n.8 (requiring "affirmative link" between municipal policy and constitutional violation); Polk County v. Dodson, 454 U.S. 312 (1981) (municipal policy must be "moving force" behind constitutional deprivation). In Monell itself, the policy at issue commanded the deprivation of constitutional rights."

City of Springfield v. Kibbe, 55 U.S.L.W. 4239, 4242 (1987) (O'Connor, J., dissenting).

Justice O'Connor's application of *Monell* principles in *Kibbe* is especially interesting for analysis of the case sought to be brought before the bar of this Court because both cases are Fourth Amendment cases involving the use of deadly force to prevent the escape of a suspect. Justice O'Connor distrusted imposing §1983 liability where there was only a remove connection, for otherwise the distinction between "vicarious liability and liability predicated on the municipality's *own* constitutional violations" would be eviscerated. *Kibbe,* 55 U.S.L.W. at 4242. By analogy to traditional tort principles where "the law has been willing to tract more distant causation when there is a cognitive component to the defendant's fault than when the defendant's conduct results from simple or heightened negligence", *id.,* she concluded that such liability might be imposed only where there was "a reckless disregard for or deliberate indifference to the rights of persons within the city's domain". *Id.*

The principles established in *Rizzo* and in *Monell* and its progeny are equally applicable to the case at bar, and the Eighth Circuit's ruling is consistent with them. Stoll did not unreasonably seize petitioner and Stoll did not command Hilke to commit an unreasonable seizure of petitioner. Nor did Stoll act with a reckless disregard or with a deliberate indifference to the rights of anyone. Stoll may have made a mistake, and his mistake may have been the result of a failure to exercise due care, but it is not unconstitutional to be negligent. See *Baker v. McCollan,* 443 U.S. 137, 146 (1979) ("Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law.").

b. Petitioner also urges certiorari on the basis of a conflict between the circuits. As conflicts go, however, there is not much of a conflict. *Byrd v. Brishke,* 466 F.2d 6 (7th Cir. 1972),

which petitioner cites three times, is a case recognized as rejected by the Court's opinion in *Rizzo*. See *Rizzo*, 423 U.S. at 385 n.2. (Blackmun, J., dissenting). *Ware v. Reed*, 709 F.2d 345 (5th Cir. 1983) relied upon *Byrd*. *Id.*, 709 F.2d at 353. In *Smith v. Heath*, 691 F.2d 220 (6th Cir. 1982) liability was imposed on an officer for "willfully" violating constitutional rights. *Id.* at 221. Defendant "personally participated in the [unlawful] search...and was in charge", *id.* at 224; defendant personally made an unlawful entry, *id.* at 225; and the court believed that he directed his subordinates "to interfere with the civil rights of another." *Id.* at 224. *Haygood v. Younger*, 718 F.2d 1472 (9th Cir. 1983) does state that an action for deprivation of civil rights can rest on negligent conduct. See *Haygood*, 718 F.2d at 1478. However, the statement is made with respect to the due process simpliciter claim, and must be regarded as overruled by *Daniels v. Williams*, 474 U.S. ____, 88 L.Ed.2d 662, 106 S.Ct. 662 (1986); and *Davidson v. Cannon*, 474 U.S. ____, 88 L.Ed.2d 677, 683, 106 S.Ct. 608 (1986) ("the protection of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due cause by prison officials"). Insofar as the Eighth Amendment claim, *Haygood* requires more than negligence: "deliberate indifference". *Haygood*, 718 F.2d 1482-1483. In any case, the *Haygood* opinion relied upon by petitioner was vacated, 729 F.2d 613 (9th Cir. 1984), and was the subject of a new opinion published at 769 F.2d 1350 (9th Cir. en banc 1985). The new opinion found a due process simpliciter violation because the officials intentionally denied the plaintiff a hearing. *Fernandez v. Chardon*, 681 F.2d 42 (1st Dir. 1982)[1] does indeed include the dictum that §1983 liability may be grounded on negligence alone, a proposition for which it cites (erroneously) *Parratt v. Taylor*. *Fernandez*, 681 F.2d at 55. But the acutal basis for imposing liability on the supervisors

---

[1] This Court granted certiorari in *Fernandez* on a statute of limitation issue on which it upheld the First Circuit. See *Chardon v. Fumero Soto*, 462 U.S. 650 (1983).

was that the supervisors had been personally involved in policies that they knew would result in persons losing their jobs because of their political affiliation and not on the basis of the supervisors' negligence. *Id.*, 681 F.2d at 56-57. *Hirst v. Gertzen*, 676 F.2d 1252 (9th Cir. 1982) is likewise based on an erroneous interpretation of *Parratt*. *Hirst*, 676 F.2d at 1263. In any case, as a §1983 claim predicated on the negligence of jail officials it, too, is inconsistent with *Daniels* and *Davidson*.[2] Indeed, the Ninth Circuit has recently itself recognized that the *Hirst* holding was based upon "an obsolete foundation". See *Escamilla v. City of Santa Ana*, 769 F.2d 266, 270 n.1 (9th Cir. 1986). *Johnson v. Duffy*, 588 F.2d 740 (9th Cir. 1978), a procedural due process case, erroneously recognized the possibility of vicarious liability, 588 F.2d at 744, and was decided before *Rizzo*, *Monell*, *Daniels* and *Davidson*. More recently, the Ninth Circuit has recognized that a claim which "amounts to no more than a claim of negligence...is no longer actionable under section 1983". *Escamilla v. City of Santa Ana, op cit*, 796 F.2d at 270. *Bruner v. Dunaway*, 684 F.2d 422 (6th Cir. 1982), *affirmed* the District Court's grant of a new trial on behalf of the defendants who had not actively participated in striking plaintiff; the dictum cited by petitioner is also based upon the repudiated opinion in *Byrd v. Brishke*. See *Bruner*, 684 F.2d at 425-426. *Putnam v. Gerloff*, 639 F.2d 415 (8th Cir. 1981) is yet another case based upon *Byrd v. Brishke;* see *Putnam*, 639 F.2d at 423; it is not based on a negligence theory; and even if it was, as a due process simpliciter case arising in a prison context, the opinion is obsolete after *Daniels* and *Davidson*. In any case, conflicts within a circuit are a disfavored basis for granting certiorari. See *Davis v. United States*, 417 U.S. 333, 340 (1974).

---

[2] The opinion was not well thought of. There was a vigorous dissent, *Hirst*, 676 F.2d at 1265-1271, and the opinion was criticized in *Massey v. Smith*, 555 F.Supp. 743, 747 (N.D.Ind. 1983), in *Emory v. Duckworth*, 555 F.Supp. 985, 989-990 (N.D.Ind. 1983), and in *Rigner v. Duckworth*, 562 F.Supp. 378, 381-382 (N.D.Ind. 1983).

c. The decisions of the Court in *Rizzo* and in *Monell* and its progeny have given the courts of appeals sufficient guidance for resolution of cases involving remote liability under §1983. Not surprisingly, analysis shows that there is no contemporary conflict in the circuits on the issue. It would be improvident to grant a writ of certiorari for yet another opinion on the issue of whether negligence is sufficient to impose §1983 liability upon a remote actor.

2. The Qualified Immunity That Respondents Enjoy Provides An Independent Ground Upon Which The Judgment Of The Court Of Appeals May Be Sustained, And The Issue Is One That Should Be Ruled Upon By The Lower Courts.

Petitioner requests the Court to address the issue of whether respondents are protected by the doctrine of qualified immunity. Petitioner does not argue that the issue presents any of the considerations governing review on certiorari set forth in Supreme Court Rule 17; evidently, petitioner seeks only to preserve the issue in the event that the Court should grant the petition on the grounds put forward in support of the other questions presented. Oddly, it is considerations that pertain to the qualified immunity defense that present one of the most telling arguments why the petition should not be granted.

"[G]overnmental officials performing discretionary functions are generally shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 816 (1982). This is a doctrine that is applicable to police officers. *Malley v. Briggs,* 475 U.S. ____, 89 L.Ed.2d 271, 106 S.Ct. 1092 (1986). Though petitioner pretends that footnote 1 of the Court's opinion in *City of Oklahoma City v. Tuttle,* 471 U.S. ____, 85 L.Ed.2d 791, 105 S.Ct. 2427 (1985) suggests that *Harlow* may have eliminated the qualified immunity defense in excessive force cases, there is nothing said in that footnote that

even hints that this is so. More to the point is footnote 4, where the Court notes that it "has never held that every instance of use of 'unreasonable force' in effecting an arrest constitutes a violation of the Fourth Amendment; nor has this Court held under circumstances such as these that there has been a deprivation of life 'without due process of law.' " *Tuttle,* 85 L.Ed.2d at 800 n.4. The Court recognized that the facts in *Tuttle* were "very similar" to the facts in *Tennessee v. Garner,* 471 U.S. ____, 85 L.Ed.2d 1, 105 S.Ct. 1694 (1985), in which the officer who committed the unconstitutional deadly force seizure was acquitted on the basis of qualified immunity. The facts are also very similar to the facts in the case at bar, which is also based on a *Tennessee v. Garner* theory.

Petitioner cites several cases for the proposition that it is clearly established that the use of excessive force is unconstitutional. *Clark v. Beville,* 730 F.2d 739 (11th Cir. 1984), however, says no such thing. Rather, the court notes that "Beville [the defendant] does not dispute that it is clearly established that a police officer may not apply undue force in effecting an arrest ..." *Clark,* 730 F.2d at 740 (emphasis added). *Fernandez v. Leonard,* 784 F.2d 1209 (1st Cir. 1986), does suggest that by 1976 there was a clearly established constitutional right to be free of "excessive force", but excessive force is defined in terms of force that "is so excessive and brutal that it 'shocks the conscience.' " *Fernandez,* 784 F.2d at 1216. The opinion also suggests[3] that the right to be free from unreasonable seizures was clearly established in 1976. *Id.* 784 F.2d at 1217. Since the plain language of the Fourth Amendment forbids unreasonable seizures in those very terms, one would have thougth that such a right would have been clearly established the moment that the amendment was ratified. In any case, the immunity issue in the present case is whether it was clearly established that the use of

---

[3] The opinion has been criticized for its lack of clarity. See *Justice v. Dennis,* 793 F.2d 573, 577 (4th Cir. 1986).

deadly force to apprehend nondangerous felons was unreasonable in Fourth Amendment terms at the time that petitioner was seized. The *Fernandez* court seems to grudgingly recognize that the unreasonableness of such force was not clearly established until 1985. *Id.* 784 F.2d at 1217 n.3. *Coon v. Ledbetter,* 780 F.2d 1158, 1164 (5th Cir. 1986), states that the use of excessive force does violate clearly established rights, but does not cite any authority for that proposition, and the opinion does not say that the right was clearly established in 1978, the date of the incident in the case at bar.

It was not clearly established in February of 1978 that the use of deadly force to apprehend nondangerous suspect is an unreasonable seizure. Petitioner cites the four to three opinion *Mattis v. Schnarr,* 547 F.2d 1007 (8th Cir. 1976) as settling that doctrine in the Eighth Circuit, but he fails to remind the Court that it had vacated that opinion before the incident in question! See *Ashcroft v. Mattis,* 431 U.S. 171 (1977). Indeed, the only appellate decisions that had considered the question up to the time of the incident had found such seizures to be constitutional. See *Jones v. Marshall,* 528 F.2d 132 (2nd Cir. 1975), and *Wiley v. Memphis Police Dept.,* 548 F.2d 1247 (6th Cir. 1977), cert. den. 431 U.S. 968. It was not until the Court's 1985 opinion in *Tennessee v. Garner,* op. cit., that the Court declared that the shooting of nondangerous felons was unconstitutional. The Court noted that as late as 1985 such seizures were approved in approximately one-half the states, *id.,* 85 L.Ed.2d 12-13, and that it "cannot be said that there is a constant or overwhelming trend away from the common-law rule." *Id.,* 85 L.Ed.2d at 14. Indeed, three justices dissented from the holding that such seizures were unconstitutional. It is clear that it was not clearly established in February of 1978 that the shooting of nandangerous fleeing felons was unconstitutional.

Petitioner relies upon the fact that the police commissioners who employed respondents had adopted an internal policy forbidding their employees from using deadly force in such cir-

cumstances. However, this Court held in *Davis v. Scherer,* 468 U.S. 183 (1984) that "[o]fficials sued for constitutional violations do not lose their qualified immunity merely becauae their conduct violates some statutory or administrative regulation." *Id.,* 468 U.S. at 194. Petitioner attempts to evade this structure by resorting to the language in *Davis* "Appellee makes no claim that the appellants' violation of the state regulation either is itself actionable under §1983 or bears upon the claim of constitutional right that appellee asserts under §1983", emphasizing the last clause. *Davis v. Scherer, supra,* 468 U.S. at 193.

Petitioner completely misapprehends the meaning of that passage. In the Court's footnote to the quoted phrase it explains: "State law may bear upon a claim under the due process clause when the property interests protected by the Fourteenth Amendment are created by state law . . ." citing *Board of Regents v. Roth,* 408 U.S. 564 (1972). *Id.,* 468 U.S. at 193 n.11. Liberty interests, too, have occasionally been held to be created by state law, although it appears that the Court has found such interests primarily in the context of prison cases. See *Hewitt v. Helms,* 459 U.S. 460 (1983). However, while the Due Process Clause gives protection to state-created liberty and property interests in its procedural aspect, the protection if affords liberty and property in its substantive aspect is very much more restricted. As Justice Powell recently pointed out: "While property interests are protected by procedural due process even thought the interest is derived from state law rather than the Constitution, *Board of Regents v. Roth,* 408 U.S. 564, 577, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972), substantive due process rights are created only by the Constitution." *Regents of University of Michigan v. Ewing,* 474 U.S. ____, 88 L.Ed.2d 523, 535, 106 S.Ct. 507 (1985) (Powell, J., concurring). The same is true of liberty interests. Substantive due process protects only liberty interests that flow from either those portions of the Bill of Rights deemed incorporated, or those whose infringement is such as to shock the conscience. See *Rochin v. California,* 342 U.S. 165 (1952), quoted in *Whitley v. Albers,*

475 U.S. ____, 89 L.Ed.2d 251, 265, 106 S.Ct. 1078 (1986). Thus, petitioner attempt to evade the strictures of *Davis* fail because any liberty interest that may have been created by the regulation is one protected only by procedural due process.[4]

Spruytte v. Walters, 753 F.2d 498 (6th Cir. 1985), upon which petitioner relies, demonstrates the fatal misunderstanding from which petitioner's argument suffers. *Spruytte* was a procedural due process case where the court found that plaintiff prisoner had a property interest conferred by state law of which he could be deprived only if the procedural requirements were observed. *Id.,* 753 F.2d at 506-508. Significantly, the discussion in *Spruytte* is relied upon in *Washington v. Starke,* 626 F.Supp 1149 (W.D. Mich. 1986), appeal dismissed 791 F.2d 936 (6th Cir. 1986), a case remarkably similar to the case at bar for in both cases defendant police officers used deadly force in violation of internal regulations. The Court cited *Spruytte* in its opinion granting summary judgment for the defendants on the basis that the unconstitutionality of the fleeing felon rule had not been established in 1982.

The real significance, then, of the qualified immunity issue is that it provides an important reason why certiorari should not be granted to review the other questions presented by the petition. The Court has suggested that a conflict may not be a sufficient ground to grant certiorari where the Court may decide the case on another ground and thus not reach the issue on which there purportedly is a conflict; see, e.g., *S.S. Monrosa v. Carbon Black Export,* 359 U.S. 180 (1959); and has likewise refused to decide constitutional issues where there are present nonconstitutional issues which might alone serve as an independent

---

[4] If this were a procedural due process case, petitioner's case would fail under the doctrine of *Parratt v. Taylor,* 451 U.S. 527 (1981) for Missouri makes available a post-deprivation remedy for unlawful arrests.

ground for the disposition of the case. See *Alma Motor Co. v. Timken-Detroit Axle Company,* 329 U.S. 129 (1946).

This case is in just that posture. The qualified immunity issue is not a close one and it is highly likely that the Court would sustain the Eighth Circuit's opinion reversing the judgments entered against respondents on this independent ground not involving a constitutional issue or a conflict.[5] Indeed, because court below did not reach the qualified immunity issue, Pet. App. p. 10a, the posture of this petition bears a close resemblance to that presented by *Barr v. Mateo,* 355 U.S. 171 (1959), where the Court refused to review an important question and ordered the court of appeals to pass upon an alternative argument - qualified privilege - not passed upon below.

There is another closely related reason why a grant of certiorari would be improvident. Petitioner did not request that the mandate of the court of appeals be stayed. Accordingly, the mandate has issued, the judgment of the district court has been vacated, and respondent Hilke's motion for summary judgment on the basis of his qualified immunity defense is now under submission in the district court. Pronouncements by the Court that have extended over many decades disfavor granting certiorari in cases where the judgment below is not final. See, e.g. *American Construction Co. v. Jacksonville T. & K.R. Co.,* 148 U.S. 372, 384 (1893); and *Coleman v. PACCAR, Inc.,* 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J.). These considerations are compelling in the circumstances presented by the instant case. Respondent's motion for summary judgment may be ruled upon while the Court is considering whether petitioner's petition is granted; certainly it will be ruled upon before the Court rules on the merits should the Court accept the case. In the

---

[5] In fact, as is argued in respondent Hilke's cross-petition filed contemporaneously with the brief, the qualified immunity defense is one that would authorize relief greater relief that the appellate court afforded him: entry of judgment in his favor.

meantime, that ruling may be appealed to the court of appeals, see *Mitchell v. Forsyth,* 472 U.S. ____, 86 L.Ed.2d 411, 105 S.Ct. ____ (1985), or it may be tried, and be appealed after trial. There is little sense in expending the Court's resources in deciding the case at this stage.

3. The Court Did Not Depart From The Accepted And Usual Course Of Judicial Proceedings In Finding Prejudicial Error In Petitioner's Closing Argument.

Petitioner claims that the Court "violated" Rule 103, Fed.R.Evid., by finding reversible error in his final argument to the jury, and accuses the court of appeals as having so far departed from the accepted and usual course of judicial procedures as to warrant this Court to exercise its power of supervision.

The court of appeals did not, of course, violate Rule 103, Fed.R.Evid. By definition, the rules of evidence govern the admission of evidence, and argument is not evidence. Technicalities notwithstanding, respondents agree that the customary rules as to final argument require objection, absent plain error, and that plain error requires prejudice. However, respondents plainly made an objection; and the objection was overruled. Pet. App. 23a. Petitioner objects to the court of appeals considering portions of his closing argument that took place just before and just after respondents' objection, but his own authorities think it proper. In *Westbrook v. General Tire & Rubber Co.,* 754 F.2d 1233, 1241 (10th Cir. 1985), the court reversed, declining to accept plaintiff's argument that defendant had objected to only one part of the argument: "We cannot look at the objected material in isolation, however. A review of the entire argument reveals that while [defendant] objected to just one community conscience statement, similar arguments pervaded [plaintiff's] argument." Likewise, in *Kehr v. Smith Barney, Upham & Harris Co.,* 736 F.2d 1283, 1286 (9th Cir. 1984), the court observed that "constant objections are certain-

ly not required, as they could antagonize the jury . . ." And so it is here. After the trial court not only overruled their objection but pronounced petitioner's argument "appropriate", respondents' were under no obligation to risk the jury's wrath when petitioner returned to the theme moments later.

Petitioner also argues that the suggestion that "the government" would pay the verdict returned against respondents was not prejudicial. One would think that it is intuitively obvious that there would be prejudice any time a jury is advised that a deep pocket impersonal corporation, public or private, would pay a judgment rendered against individuals. Indeed, on consideration, the scattering of the cases cited by petitioner do not say otherwise. *Perrin v. Anderson,* 784 F.1d 1040 (10th Cir. 1986), did nothing more than observe that, absent a claim for punitive damages, it is error to point out to the jury that the individual defendant, and not the state employer, must pay for any judgment rendered against him. *Perrin,* 784 F.2d at 1047). Significantly, the court treated the issue of indemnity by the government as equivalent to insurance. *Id. Hobson v. Wilson,* 556 F.Supp. 1157 (D.C. 1982), mod. in other respects at 737 F.2d. 1 (D.C. Cir. 1984), does no more that say that the defendants were not entitled to an instruction that the government would not pay a judgment entered against them, where there was no trace of evidence placed before the jury that the government might pay the judgment. *Hobson,* 556 F.Supp at 1189. The implication of the court's opinion - that such an instruction would be called for if such evidence had been placed before the jury - is significant because that is exactly what happened in the case below. In *Roy v. Employers Mutual Casualty Company,* 368 F.2d 902, 905 (5th Cir. 1966), the defendant was the insurance company itself.

Those who have considered the issue have concluded that jury's are more likely to return §1983 verdicts against local governments than they are to return verdicts against individual public officials. See Newman, Suing the Lawbreakers: Pro-

posals to Strengthen The Section 1983 Damage Remedy for Law Enforcers' Misconduct: 87 Yale L.J. 447 (1978); Project, Suing the Police in Federal Court, Yale L.J. 781, 800-802 (1979); and M. Avery & D. Rudovsky, Police Misconduct: Law and Litigation, §3.5(a) (2d.Ed. 1985). Thus, common sense and considered opinion agree.

In *New York Central Railroad Company v. Johnson*, 279 U.S. 310 (1929), this Court reversed a judgment where there was prejudice in closing argument, noting that "[t]he failure of the trial judge to sustain [defendant's] objection, or otherwise to make certain that the jury would disregard the appeal, could only have left them with the impression that they might be influenced by it in rendering their verdict, and thus its prejudicial effect was enhanced." *Id.*, 279 U.S. at 318. And so it is here: when the district judge not only overruled respondents' objection, but pronounced petitioner's argument "appropriate", Pet. App 23a, the prejudice was enhanced. Far from departing from the accepted and usual course of judicial proceedings, the court of appeals faithfully followed this Court's example.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JAMES J. WILSON
City Counselor
*JULIAN L. BUSH
Assistant City Counselor
Room 314 City Hall
St. Louis, MO 63103
622-3361

Attorneys for Respondents

*Counsel of Record